



**Australian Government**

**Department of Climate Change, Energy,  
the Environment and Water**

# **Reconsideration of controlled action decisions under the *Environment Protection and Biodiversity Conservation Act 1999***

Submission to the Inquiry into the Environment  
Protection and Biodiversity Conservation Amendment  
(Reconsideration of Decisions) Bill 2024

18 October 2024

---

# Reconsideration of controlled action decisions

This submission provides an overview of the operation of the current provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) relating to reconsideration of controlled action decisions (reconsiderations).

The department has published a policy statement which describes the process and grounds for the reconsideration of referred decision made under the EPBC Act, see [EPBC Act Policy Statement - Reconsideration: Implementing the requirements of sections 78, 78A, 78B and 78C of the EPBC Act - DCCEEW<sup>1</sup>](#).

The submission does not represent legal or professional advice. This submission should be read in the context of the EPBC Act, EPBC Regulations and the aforementioned policy statement. To the extent of any inconsistency, readers should refer to the EPBC Act, EPBC Regulations and then the policy statement.

## Controlled action decision

Subsection 75(1) requires the Commonwealth Environment Minister (the Minister) to decide whether an action that is the subject of a proposal referred to the Minister is a controlled action, and if so, which provisions of Part 3 are controlling provisions for the action.

The Minister may also determine that the action is not a controlled action (commonly referred to as an NCA) or is not a controlled action if undertaken in a particular manner (NCA-PM). Throughout this document the Minister's decision under subsection 75(1) is referred to as a controlled action decision.

A controlled action is an action that is prohibited without approval under Part 9 for the purposes of a provision of Part 3. Part 3 prohibits the taking of an action that has a significant impact<sup>2</sup> on a matter protected by a provision of Part 3, known as a controlling provision.

The controlling provisions in Part 3 protect matters of national environmental significance, as well as some other protected matters (such as actions involving Commonwealth land or Commonwealth Heritage places overseas). Matters protected under Part 3 are referred to throughout this document as protected matters.

## Reconsiderations

Division 3 of Part 7 of the EPBC Act allows the Minister limited power to reconsider a prior controlled action decision and, dependent on the outcome of that reconsideration, revoke the previous decision and substitute it with a new one. The reconsideration may relate to the decision whether the action is a controlled action, the decision what provisions of Part 3 are controlling provisions for the action, or both.

If the Minister confirms the original controlled action decision there is no change and the action retains its original status. In cases where the reconsideration determines that original decision should be revoked and substituted by a decision that the action is a controlled action, the

---

<sup>1</sup> <https://www.dcceew.gov.au/environment/epbc/publications/epbc-act-policy-reconsideration>

<sup>2</sup> Consideration of this impact includes whether the action has, will have, or is likely to have a significant impact on a matter protected under Part 3.

action may not lawfully begin or continue until an assessment is completed and approval has been granted under the EPBC Act.

Reconsiderations only apply in relation to controlled action decisions under section 75. Subsection 78(3) ensures a decision under section 75 for an action cannot be reconsidered where the action has already been approved or refused, or where the action has already been taken.

### ***Criteria for reconsideration of a decision***

Subsection 78(1) of the EPBC Act allows the Minister to revoke a decision made under subsection 75(1) about an action and substitute a new decision, provided one or more of the criteria below are met.

The reconsideration criteria in subsection 78(1) include:

- The Minister is satisfied that the revocation and substitution is warranted by the availability of **substantial new information** about the impacts that the action has on a protected matter (paragraph 78(1)(a)).
- The Minister is satisfied that the revocation and substitution is warranted by a **substantial change in circumstances** that was not foreseen at the time of the first decision and relates to impacts on a protected matter (paragraph 78(1)(aa)).
- The decision that the action was not a controlled action was for one of the following reasons and the Minister is satisfied that **reason no longer applies or is no longer the case**:
  - that the action would be taken in a particular manner identified under subsection 77A(1) in the notice given under section 77 (paragraph 78(1)(b))
  - the action was covered by a bilateral agreement and a management arrangement or an authorisation process that is a bilaterally accredited (paragraph 78(1)(ba))
  - the action was covered by a declaration under section 33 and a management arrangement or an authorisation process that is an accredited for the purposes of the declaration (paragraph 78(1)(c))
  - the action was covered by a declaration under section 37A and a bioregional plan to which the declaration relates (paragraph 78(1)(ca)).
- The Minister may also reconsider a decision if they are **requested to do so by a Minister of a State or Territory** under section 79 (paragraph 78(1)(d)).

### ***Making a reconsideration request - person other than a State or Territory Minister***

Subsection 78A(1) of the EPBC Act allows a person (other than a Minister of a State or Territory) to request the Minister to reconsider a decision made under subsection 75(1) about an action, on the basis of the reconsideration criteria set out in paragraphs 78(1)(a) to (ca).

Subsection 78A(2) provides that a request under subsection 78A(1) must:

- a) be in writing

- b) set out the basis on which the person thinks the decision should be reconsidered
- c) comply with any other requirements in the regulations.

Regulation 4AA.01 of the EPBC Regulations specifies additional requirements for requests under subsection 78A(1), including (but not limited to) that the request must:

- a) identify the ground or grounds that are being relied upon to make the request
- b) include the source of any information provided
- c) provide details of when the information became available.

### ***Continuation of assessment during reconsideration***

If a reconsideration request is made by a designated proponent in relation to a decision that their action is a controlled action or that particular provisions are controlling provisions, Part 8 of the EPBC Act will cease to apply in relation to the action until the Minister has made a decision on the reconsideration request (paragraph 78A(3)(a)). This means that assessment of the action cannot continue until the reconsideration decision is made. If the Minister confirms their original decision, application of Part 8 will resume (subsection 78A(4)).

If the reconsideration request was made by another person and is in relation to a decision that an action is a controlled action or that particular provisions are controlling provisions, Part 8 continues to apply as normal and the assessment may proceed, subject to the outcome of the reconsideration (paragraph 78A(3)(b)).

### ***Informing interested persons and inviting comments***

If the Minister receives a reconsideration request made under subsection 78A(1), they must inform and invite comments from the following people, to be provided within 10 business days:

- the designated proponent, if the request is from someone other than the designated proponent
- any other Commonwealth Minister who the Minister believes has administrative responsibilities relating to the request
- the appropriate Minister of the State or Territory (if any), if the Minister thinks the action may have an impact on a matter protected under Division 1 of Part 3.<sup>3</sup>

The Minister must provide the designated proponent with information relating to the request that the Minister considers appropriate. The Minister is not obligated to provide the proponent with all information relating to the request e.g. the identity of the person who made the request (subsection 78B(3)).

Public comment must also be sought, within a period of 10 business days, on whether the criteria for reconsideration under paragraphs 78(1)(a) to (ca) are applicable in relation to the action (subsection 78B(6)).

---

<sup>3</sup> For clarity, this does not include matters protected under Division 2 of Part 3, such as actions involving Commonwealth land, actions involving Commonwealth Heritage places overseas and protection of the environment from Commonwealth actions.

### ***Making a reconsideration decision and providing notice of that decision***

As soon as practicable after the end of the time within which information or comments may be received under section 78B, the Minister must conclude the reconsideration by either confirming their original decision or by revoking that decision and substituting it with their new decision (paragraph 78C(1)(b)).

Subsection 78C(2) requires the Minister to give written notice of the outcome of the reconsideration to the following people:

- a) the person who requested the reconsideration
- b) the person proposing to take the action (if that person is not the person that requested the reconsideration)
- c) the designated proponent of the action (if the designated proponent is not the person referred to in points a) or b))
- d) if the reconsideration relates to an action referred to in subsection 78B(5) relating to an action proposed to be taken in a State or Territory - the appropriate Minister of the State or Territory.

Persons that receive a notification under paragraph 78C(2)(a), (b) or (c) (the person who requested the reconsideration, the person proposing to take the action or the designated proponent) may request a statement of reasons for the decision. This must be requested within 28 days of the person receiving the notification. The Minister must provide reasons as soon as practicable within 28 days of receiving the request (subsection 78C(4)).

In cases where the original decision was that the action was either NCA or NCA-PM, and the reconsideration determines that decision should be revoked and substituted by a decision that the action is a controlled action, the action may not lawfully begin or continue until an assessment is completed and approval has been granted under the EPBC Act.

Conversely, where an action was originally determined to be a controlled action but the Minister determines that this decision should be revoked and replaced with a NCA or NCA-PM decision, the action may proceed without approval being granted under the EPBC Act.

### ***Publishing notice of the reconsideration decision outcome***

After providing the written notices outlined above, the Minister must then publish notice of the outcome of the reconsideration, in accordance with the EPBC Regulations (subsection 78C(3)). Regulation 4A.01 of the EPBC Regulations requires that the notice must be published in the Gazette and on the internet.

The notice must contain the following information:

- the identification number for the action, allocated by the Department
- a brief description or descriptive title for the action
- the location of the action
- the name of the person intending to take the action
- notice of the outcome of the reconsideration under subsection 78C(1).

### ***Reconsideration requests by a State or Territory Minister***

Specific requirements apply if a reconsideration request is made by a Minister of a State or Territory under section 79.

Within 10 business days of notifying the appropriate Minister of the State or Territory of a controlled action decision in relation to an action proposed to be taken in that State or Territory, that State or Territory Minister may request that the Minister reconsider their decision(s).

After receiving such a request, subsection 79(3) sets out that the Minister has 20 business days within which to:

- reconsider the decision
- either confirm it or revoke it and substitute a new decision for it
- give written notice of the outcome, including reasons, to the requesting State or Territory Minister, the person proposing to take the action, and the designated proponent of the action, and then publish notice of the outcome and the reasons for it in accordance with the EBPC Regulations.

Regulation 16.02 of the EPBC Regulations requires that the outcome of reconsideration requests made by a State or Territory Ministers must be published in the Gazette and on the internet.